BAHRAM NIKKHOUYABGRAM NAYEB A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
AZIAH ALI JCA
[CRIMINAL APPEAL NO: B-05-327-12-2011]
15 APRIL 2013 C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in 1,465g methamphetamine - Drugs found in appellant's jacket while exiting from Kuala Lumpur International Airport - Discrepancies between search list and acknowledgement of receipt of exhibits by investigating officer - Whether jacket belonged to another co-passenger - Whether sufficient rebuttal evidence adduced by prosecution - Whether knowledge of drugs proven - Whether presumption under s. 37(da) correctly invoked - Whether conviction safe* D

A team of police members led by SP3 were on duty at the Kuala Lumpur International Airport ('KLIA'). According to SP3, he saw the appellant wearing a black jacket with the brand name 'Eisenegger' ('the Eisenegger jacket') taking a red coloured bag from the carousel and heading for the exit. Because the appellant was seen to be acting in a suspicious manner, SP3 stopped the appellant. Upon inspection, SP3 claimed that drugs were found stitched inside the Eisenegger jacket worn by the appellant but no personal items of the appellant were found in this jacket. According to SP3, inside the red bag carried by the appellant, he found another black jacket with the brand name 'Pierre Avva' ('the Pierre Avva jacket'). Inside this jacket, SP3 had recovered personal documents of the appellant. SP3 then issued a search list (exh. P16). SP3 handed over the appellant, the police report and the items seized to SP5, the investigating officer (IO). Both SP5 and SP3 signed an acknowledgment of receipt (exh. P17). According to the search list P16, the Eisenegger jacket with the drugs was recovered from the appellant and the Pierre Avva jacket was recovered from the red bag. Exhibit P17, on the other hand showed that the Eisenegger jacket was found in the red bag and the drugs were found in the Pierre Avva jacket. When cross-examined on the discrepancies, SP3 said that he had made a mistake. SP3 disagreed with the suggestion by the defence that E F G H I

A the appellant was wearing the Pierre Avva jacket and was holding the Eisenegger jacket. In his defence, the appellant claimed that he had come to Malaysia to work. He had met one Moshk Pour Hossein ('Hossein') on the flight. Upon arrival at KLIA, as they walked to customs, Hossein had suddenly stopped walking to talk
B on his handphone and had passed the Eisenegger jacket to the appellant to hold. At this juncture, SP3 had approached the appellant. The appellant denied he was wearing the Eisenegger jacket and submitted that he was holding the Eisenegger jacket for Hossein. The appellant submitted that SP3 had also arrested
C Hossein and both he and Hossein were taken to a room and handcuffed. The prosecution had relied on the presumption under s. 37(da) of the Dangerous Drugs Act 1952 ('the Act') to prove its case. The learned trial judge ('judge') had convicted and sentenced the appellant for an offence under s. 39B(2) of the Act
D for trafficking in 1,465g of methamphetamine. The appellant appealed against his conviction and sentence on the grounds that: (a) the learned judge had misdirected herself in not sufficiently considering the defence case; and (b) the learned judge erred in failing to rule whether the appellant had rebutted the presumption
E under s. 37(da) of the Act.

Held (allowing appeal; setting aside conviction and sentence) Per Aziah Ali JCA delivering the judgment of the court:

F **(1)** Apart from the discrepancies between the search list exh. P16 and exh. P17, the testimony of SP3 had been contradicted by SP6. In his cross-examination, SP3 agreed with defence counsel that he had no knowledge whatsoever about Hossein. However, SP6 in his testimony said that he had informed SP3
G about Hossein after SP6 had lodged his report. Had the judge considered the inconsistencies between the testimony of SP3 and SP6 and the inconsistencies between exhs. P16 and P17, Her Ladyship would have reminded herself to treat the testimony of SP3 with caution. The failure of the judge to
H direct her mind to the evidence of SP3 and evaluate the reliability of his evidence made her decision to accept his testimony without reservation amounted to a misdirection by way of non-direction. (para 18)

I **(2)** The question whether the appellant was wearing the Eisenegger jacket as claimed by SP3 or whether the appellant was wearing the Pierre Avva jacket and holding the Eisenegger jacket as the appellant claimed, and whether the appellant had

indicated to SP3 that the Eisenegger jacket did not belong to him and that he had pointed to Hossein, were crucial facts having regard to his defence that he was an innocent carrier. The onus was upon the prosecution to disprove these important parts of the appellant's version of facts; *Aedy Osman v. PP* (refd). (para 20)

(3) There were nine members in the team on duty together with SP3 at the time the appellant was arrested. Except for the testimonies of SP3 and SP6, no other member of the team was called. The prosecution ought to have called other relevant officers present together with the appellant and SP3 to testify to rebut the appellant's claim particularly when it was not denied that Hossein was also arrested by SP6 soon after the appellant's arrest. The lack of rebuttal evidence on these relevant and material facts was detrimental to the prosecution. (para 20)

(4) In the absence of the statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. In the absence of direct evidence of trafficking, the prosecution must prove the ingredient of "possession". Having only custody or control over the said drugs is insufficient to establish "possession" which is an important ingredient in the charge of trafficking. The mere act of carrying is not sufficient to constitute the offence of trafficking. The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. Knowledge is the key ingredient of possession. Proof of possession in criminal law requires the prosecution to prove that the possessor knew the nature of the thing possessed; *PP v. Abdul Manaf Muhammad Hassan* (refd); *Chan Pean Leon v. PP* (refd). (para 23)

(5) The judge overlooked the issue whether it could be inferred that the appellant knew not only of the existence of the eight packets but also that the eight packets contained dangerous drug. The prosecution must prove the ingredient of "possession" and the trial judge must make an affirmative finding of "possession" before the presumption of trafficking under s. 37(da) of the Act can be invoked. The failure of the judge to make an affirmative finding that the appellant had *mens rea* possession of the drugs was a serious misdirection; *Muhammed Hassan v. PP* (refd); *Ibrahim Mohamad & Anor v. PP* (refd). (paras 24 & 25)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Sebuah pasukan polis yang diketuai SP3 bertugas di Lapangan Terbang Antarabangsa Kuala Lumpur. Menurut SP3, dia telah melihat perayu yang memakai jaket hitam berjenama 'Eisenegger' B ('jaket Eisenegger') mengambil sebuah beg berwarna merah dari karusel dan menuju keluar. SP3 telah menghentikan perayu kerana perayu telah bertindak dalam keadaan yang mencurigakan. Selepas membuat pemeriksaan, SP3 mendakwa bahawa dadah-dadah telah dijumpai dijahit di dalam jaket Eisenegger yang dipakai perayu. C Tiada barang-barang peribadi ditemui di dalam jaket ini. Menurut SP3, di dalam beg merah yang dibawa oleh perayu, dia menemui satu lagi jaket hitam berjenama 'Pierre Avva' ('jaket Pierre Avva'). Di dalam jaket ini, SP3 menemui beberapa dokumen peribadi perayu. SP3 mengeluarkan senarai carian (eks. P16). SP3 D kemudiannya menyerahkan perayu, laporan polis dan barangan yang dirampas kepada SP5, pegawai penyiasat (PP). Kedua-dua SP5 dan SP3 telah menandatangani akuan penerimaan (eks. P17). Menurut senarai carian P16, jaket Eisenegger yang mengandungi dadah-dadah telah ditemui daripada perayu dan jaket Pierre Avva E yang mengandungi dokumen-dokumen peribadi perayu ditemui daripada beg merah. Ekshibit P17 pula menunjukkan bahawa jaket Eisenegger ditemui di dalam beg merah dan dadah-dadah pula dijumpai di dalam jaket Pierre Avva. Apabila diperiksa balas mengenai percanggahan-percanggahan, SP3 menyatakan bahawa F dia telah membuat satu kesilapan. SP3 tidak bersetuju dengan cadangan yang dibuat oleh pihak pembelaan bahawa perayu telah memakai jaket Pierre Avva dan telah memegang jaket Eisenegger. Dalam pembelaannya, perayu berhujah bahawa dia telah datang ke Malaysia untuk bekerja. Perayu telah berkenalan dengan satu G Moshk Pour Hossein ('Hossein') dalam penerbangan. Apabila tiba di KLIA, semasa mereka sedang berjalan ke arah kastam, Hossein tiba-tiba berhenti untuk menjawab telefon bimbitnya dan telah menyerahkan jaket Eisenegger kepada perayu untuk dipegangnya. Pada masa inilah SP3 telah menghampiri perayu. Perayu menafikan H bahawa dia telah memakai jaket Eisenegger dan menyatakan bahawa dia telah memegang jaket Eisenegger untuk Hossein. Perayu menyatakan bahawa SP3 telah juga menangkap Hossein dan kedua-dua mereka telah dibawa ke sebuah bilik dan digari. Pihak pendakwaan telah bergantung kepada anggapan di bawah I s. 37(da) Akta Dadah Berbahaya 1952 ('Akta') untuk membuktikan kesnya. Yang arif hakim ('hakim') telah mensabitkan kesalahan dan menjatuhkan hukuman ke atas perayu untuk kesalahan pengedaran 1,465g methamphetamine di bawah s. 39B(2) Akta. Perayu

merayu terhadap sabitan dan hukuman atas alasan-alasan (a) yang arif hakim telah tersalah arah apabila gagal mempertimbangkan kes pembelaan dengan secukupnya; dan (b) yang arif hakim khilaf apabila gagal memutuskan sama ada perayu telah menyangkal anggapan di bawah s. 37(da) Akta.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Selain daripada percanggahan di antara senarai carian eks. P16 dan eks. P17, keterangan SP3 telah bercanggah dengan SP6. Dalam pemeriksaan balas, SP3 bersetuju dengan peguam pembelaan bahawa dia tiada pengetahuan mengenai Hossein. Walau bagaimanapun, SP6 dalam keterangannya menyatakan bahawa dia telah memberitahu SP3 mengenai Hossein selepas SP6 membuat laporannya. Jika hakim telah mempertimbangkan percanggahan-percanggahan di antara keterangan SP3 dan SP6 dan percanggahan-percanggahan yang terdapat dalam eks. P16 dan P17, beliau akan mengingatkan dirinya untuk mengambil keterangan SP3 dengan berhati-hati. Kegagalan hakim untuk mengarahkan mindanya kepada keterangan SP3 dan menilai kebolehpercayaan keterangannya telah membuatkan keputusan beliau menerima keterangan SP3 tanpa keraguan mengakibatkan salah arah melalui bukan arahan.

(2) Persoalan sama ada perayu memakai jaket Eisenegger seperti yang didakwa oleh SP3 atau sama ada perayu memakai jaket Pierre Avva dan memegang jaket Eisenegger seperti yang didakwa perayu, dan sama ada perayu telah memberi petunjuk kepada SP3 bahawa jaket Eisenegger bukan kepunyaannya dan dia telah menunjuk ke arah Hossein adalah fakta-fakta penting mengambil kira pembelaannya adalah perayu hanya pembawa yang tidak bersalah. Beban adalah atas pihak pendakwaan untuk menyangkal fakta-fakta penting versi perayu; *Aedy Osman v. PP* (dirujuk).

(3) Terdapat sembilan ahli dalam pasukan yang bertugas bersama-sama dengan SP3 semasa perayu ditahan. Selain daripada keterangan-keterangan SP3 dan SP6, tiada anggota pasukan lain yang dipanggil. Pihak pendakwaan seharusnya memanggil pegawai-pegawai relevan yang berkaitan yang hadir bersama-sama dengan perayu dan SP3 untuk memberi keterangan supaya dapat menyangkal dakwaan perayu terutamanya apabila

A ia tidak dinafikan bahawa Hossein juga ditangkap oleh SP6 tidak lama selepas penangkapan perayu. Kekurangan keterangan bantahan berkenaan fakta-fakta yang penting dan relevan adalah memudaratkan bagi pihak pendakwaan.

B **(4)** Dalam ketiadaan anggapan berkanun, pengetahuan harus dibuktikan sama ada melalui keterangan langsung atau keterangan ikut keadaan. Dalam ketiadaan keterangan langsung pengedaran, pihak pendakwaan harus membuktikan unsur "milikan". Hanya mempunyai jagaan atau kawalan ke atas C dadah-dadah tersebut tidak memadai untuk membuktikan "milikan" yang merupakan unsur penting dalam pertuduhan pengedaran. Perbuatan semata-mata membawa sesuatu tidak cukup untuk membentukkan kesalahan pengedaran. Perbuatan fizikal memiliki atau mengawal harus diiringi dengan keterangan D bahawa tertuduh mempunyai pengetahuan mengenai dadah-dadah tersebut. Pengetahuan adalah unsur utama milikan. Bukti milikan dari segi undang-undang jenayah memerlukan pihak pendakwaan membuktikan pemilik tahu sifat bahan yang dimiliki; *PP v. Abdul Manaf Muhammad Hassan* (dirujuk); *Chan* E *Pean Leon v. PP* (dirujuk).

(5) Hakim gagal melihat isu sama ada ia boleh disimpulkan bahawa perayu mempunyai pengetahuan berkenaan kewujudan lapan bungkusan itu dan juga mengetahui bahawa lapan bungkusan F itu mengandungi dadah-dadah berbahaya. Pihak pendakwaan harus membuktikan unsur "milikan" dan hakim bicara harus membuat dapatan afirmatif "milikan" sebelum anggapan pengedaran di bawah s. 37(da) Akta boleh digunakan. Kegagalan hakim untuk membuat dapatan afirmatif bahawa G perayu mempunyai milikan *mens rea* dadah-dadah adalah satu salah arah yang serius; *Muhammed bin Hassan v. PP* (dirujuk); *Ibrahim Mohamad & Anor v. PP* (dirujuk).

Case(s) referred to:

Aedy Osman v. PP [2011] 1 CLJ 273 FC ***(refd)***

H *Chan Pean Leon v. PP [1956] 1 LNS 17 HC* ***(refd)***

Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***

Jazuli Mohsin v. PP [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165 HC ***(refd)***

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

I *Muhammed Hassan v. PP [1998] 2 CLJ 170 FC* ***(refd)***

PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***

PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***

PP v. Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113 CA ***(refd)***
PP v. Reza Mohd Shah Ahmad Shah [2010] 1 CLJ 541 FC ***(refd)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
Subramaniam Arumugam v. PP [2000] 2 CLJ 1 FC ***(refd)***
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 39B(2)
Evidence Act 1950, s. 114(g)

For the appellant - Hisyam Teh Poh Teik (Salim Bashir with him); M/s Teh Poh Teik & Co
For the respondent - Saiful Edris Zainuddin; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-252-2010]

Reported by Amutha Suppayah

JUDGMENT

Aziah Ali JCA:

[1] The Shah Alam High Court convicted and sentenced the appellant for an offence under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act") for trafficking in 1,465 grams of methamphetamine on 9 February 2010 at about 9.40pm at Carousel D, Level 3 International Arrivals, Main Terminal, Kuala Lumpur International Airport, District of Sepang, Selangor Darul Ehsan. The appellant appeals against his conviction and sentence. Having considered the evidence and the submissions made, we found that it was not safe to maintain the conviction. We allowed the appeal and set aside the appellant's conviction and sentence. We now give our reasons.

The Case For The Prosecution

[2] The evidence adduced by the prosecution through SP3 D/Sgt Hassan bin Jamil shows that on 9 February 2010 he together with nine other members of his team was on duty at Carousel D, Level 3 of the Kuala Lumpur International Airport ("KLIA") observing passengers arriving on flight GF280 from Bahrain. SP3 saw a man (identified as the appellant) wearing a black jacket who had taken a red coloured bag from the carousel and was heading for the exit. SP3 stopped the appellant because

according to him the appellant was acting in a suspicious manner. SP3 identified himself and asked to see his passport (exh. P14). The passport shows that the appellant is an Iranian national. SP3 then examined the red bag witnessed by the appellant and his team members. Inside this bag were a few pieces of clothing. SP3 then asked the appellant to remove the black jacket that the appellant was wearing. SP3 found the jacket heavy and upon inspecting the jacket he found bulges. Upon removing the stitches he found plastic packets containing white crystal powder suspected to be drugs. No personal items of the appellant were found in this jacket. SP3 then took the appellant and the items to the narcotics office also at level 3 where he lodged a report (exh. P12). The black jacket carried the brand name 'Eisenegger' ("the Eisenegger jacket"). He marked the Eisenegger jacket (exh. P13) with the letter 'A', his signature and date. He marked the eight plastic packets 'A1-A8'. He also put his signature on the red bag (exh. P15) and the clothings (exh. P15A-E) which SP3 said were found inside the bag. The clothings include a black jacket with the brand name 'Pierre Avva' ("the Pierre Avva jacket"). Inside this jacket (exh. P15A) SP3 had recovered personal documents of the appellant consisting of his army ID card, his driving licence and his bank card.

[3] SP3 then issued a search list (exh. P16). He also lodged a police report (exh. P12). SP3 then handed over the appellant, the police report and the items seized to SP5, the investigating officer (IO) Inspector Tuan Azhar bin Tuan Yacob. Both SP5 and SP3 signed an acknowledgment of receipt (exh. P17).

[4] According to the search list P16, the Eisenegger jacket with the drugs was recovered from the appellant. The Pierre Avva jacket in which were found the appellant's personal documents was recovered from the red bag. Exhibit P17 on the other hand shows that the Eisenegger jacket was found in the red bag (item No. 11). The drugs were found in the Pierre Avva jacket (item No. 12). SP3 was cross examined on the discrepancies between the search list exh. P16 and exh. P17 both of which were prepared by him. According to SP3, he had made a mistake and that item No. 12 should read 'Eisenegger' jacket and not 'Pierre Avva' jacket. SP3 disagreed with the suggestion by the defence that the appellant was wearing the Pierre Avva jacket and was holding the Eisenegger jacket. SP3 disagreed that when he tried to seize the said jacket the appellant had pointed to another passenger and that the appellant had indicated to him that the

jacket belonged to that person. SP3 disagreed with learned counsel for the defence that the other person was arrested together with the appellant. SP3 insisted that he only arrested the appellant. SP3 said that he did not know that the other person was on the same flight as the appellant. In short SP3 denied any knowledge whatsoever of that person or of his arrest by SP6 and said he has no knowledge what has happened to that person.

[5] SP3 signed another acknowledgment of receipt (exh. D18) together with one C/I Wan Ahmad Faizal bin Wan Razak, an officer from Bukit Aman. In exh. D18 three handphones were listed, one belonging to the appellant and two belonging to one 'Hossein Moshk Pour'. In respect of exh. D18, SP3 said that C/I Wan Ahmad Faizal had requested for the appellant's handphone and so he had to issue exh. D18 for C/I Wan Ahmad Faizal to sign. He did not prepare exh. D18 and did not know who prepared it. He ticked the first item to indicate that the handphone belonging to the appellant was surrendered to C/I Wan Ahmad Faizal. He said he does not know the owner of the other two handphones and denied handing over the two handphones to C/Inspector Wan Ahmad Faizal.

[6] SP6 Corporal Zulkefli bin Zainal, a member of the team on duty together with SP3 testified that he was approximately 30 feet away from where SP3 was inspecting the bag and the jacket worn by the appellant. He saw SP3 giving a signal that drugs had been found. He remained where he was while SP3 took the appellant to the narcotics office. Approximately five minutes later SP6 saw a male (identified as "Moshk Pour Hossein Mohamed Ali") acting suspiciously. He then identified himself and conducted a search of this person's bag but did not find anything suspicious. Together with L/Cpl Khanna he took Moshk Pour Hossein Mohamed Ali ("Hossein") to the narcotics office to conduct a body search and further inspection of his bag. Still nothing was found. SP6 then lodged a police report (exh. P22) and later informed SP3 about his report. Then Bukit Aman Narcotics Division took over the investigation of Hossein. SP6 did not seize anything from Hossein and he has no knowledge of the items listed in exh. D18. SP6 also disagreed that Hossein's arrest was connected to the appellant's arrest.

[7] Reverting to the IO SP5, he said that he kept the eight plastic packets and the Eisenegger jacket in a locked drawer in his office at the Kajang Police Headquarters. Only he had the keys

to the drawer. He placed the bag, the other clothings and items on top of a locked cupboard in his office. At the trial the Pierre Avva jacket was not produced. SP5 admitted that he did receive the said jacket from SP3 but had discovered that it was missing when he returned to his office. He checked with the narcotics office at KLIA but the jacket was not found. SP5 said he could have misplaced the said jacket when he was returning to his office. No photograph of this jacket was taken. According to SP5 he did try on the Eisenegger jacket exh. P13, first without the drugs and then with the drugs and he found a marked difference in the weight of the jacket. On 17 February 2010 at the Sepang Police Headquarters SP5 conducted a fitting exercise of the Eisenegger jacket on the appellant and had photographs taken (exh. P20). On the morning of 17 February 2010, SP5 delivered the eight plastic packets to the chemist SP1 Maimoonah binti Sulaiman. The chemist SP1 Maimoonah binti Sulaiman analysed the eight plastic packets and prepared a report which showed that the eight packets contained 1,465g of methamphetamine (exh. P9).

Findings Of The High Court

[8] The prosecution relied on the presumption under s. 37(da) of the Dangerous Drugs Act 1952 ("the Act") to prove its case. In the learned trial judge's grounds of judgment Her Ladyship said as follows:

> In this case, the prosecution in its Opening Address stated that it was relying on the second method i.e. by invoking the presumption of trafficking under section 37(da) of the Act. Therefore the prosecution would have to prove custody and control, knowledge and presume trafficking.

[9] On the issue of custody and control, Her Ladyship rejected the suggestion by the defence that the appellant was wearing the Pierre Avva jacket and holding the Eisenegger jacket for Hossein on the basis that SP3 "stood steadfast to the fact that the accused was wearing jacket (P13)." The learned judge found that because the drugs were found in the Eisenegger jacket worn by the appellant and the appellant being caught "red handed" therefore the appellant "indeed had the custody and control of the jacket that "contained" or in which were the packets with the drugs". The learned judge found that even if the appellant was holding the said jacket, the jacket was in the custody and control of the appellant.

[10] On the issue of knowledge the learned trial judge made the following findings to infer that the appellant must have had knowledge that in the jacket P13 were the eight packets:

(i) The conduct of the appellant who according to the learned Judge "was seen to be restless ("keadaan gelisah dan serba salah") when being stopped for examination";

(ii) The jacket P13 that had eight packets would be heavy or heavier than an ordinary jacket, and

(iii) That SP3 said that the jacket had bulges ("bonjolan-bonjolan"), therefore it is unlikely the appellant did not know.

The learned judge found that taking into consideration the weight of the eight packets and the bulges, there is a strong inference that the appellant would have known of the existence of the packets. Having found that the prosecution has proved custody and control and knowledge, the learned judge invoked the presumption under s. 37(da) of the Act. The learned judge found that since the prosecution has proved the element of drugs and trafficking, the prosecution has therefore proven a *prima facie* case against the appellant as charged and the appellant was called to enter his defence.

The Case For The Defence

[11] According to the appellant this was his first trip to Malaysia. He came here to take up an offer of employment from an old friend named 'Said' who is in the restaurant business who offered him a salary of about RM2,000. He has the restaurant's address which Said told him to show to the taxi driver. Said had promised to get him a work permit. He first met Hossein on the flight when Hossein came to introduce himself to him. They spoke for only about two-three minutes. Upon arrival at KLIA they walked to the immigration counter. After clearing immigration they both walked towards the customs when Hossein suddenly stopped walking to talk on his handphone and passed his jacket to the appellant to hold. Then SP3 approached him and asked for his passport. At that time the appellant said Hossein was about ten feet behind him. The appellant said he could not understand what SP3 was saying so he called out to Hossein to translate. SP3 then went to Hossein and brought Hossein to the place where the appellant was. He was shocked when he saw the things discovered from the jacket and he asked Hossein what those things were. He said that the jacket was Hossein's and Hossein did not tell him that inside

A the jacket were drugs. Although he could not understand English well the appellant said he could understand Hossein telling SP3 that the things were not his and that he did not know the appellant. The appellant denied he was wearing the Eisenegger jacket. He said that he was wearing the Pierre Avva jacket and
B was holding the Eisenegger jacket for Hossein. The appellant said he held the jacket and he did feel the jacket was heavy but he was not concerned as he was only holding the jacket for Hossein. He denied knowing that there were drugs in the jacket. He contended that the drugs belonged to Hossein. According to the
C appellant he was asked to take off his jacket and his personal belongings were inside the pocket of his jacket. The appellant said that the officer who arrested him (SP3) was also the officer who had arrested Hossein. Both he and Hossein were taken to a room and handcuffed. In the room his handphone and Hossein's
D handphone were taken. The appellant agreed that he signed P16 but said that he did not understand and P16 was not explained to him. In cross examination the appellant denied that because he had a return ticket therefore it is not true that he had come to Malaysia to work. The appellant denied that he came to Malaysia
E to traffic in drugs. He denied that Hossein did not give him the jacket to hold after he had taken his bag from the carousel while Hossein spoke on the phone. The appellant denied that he was arrested alone. According to the appellant when the drugs were found he had pointed twice to Hossein and said "Hossein".

F

Decision Of The High Court

[12] In considering the defence case, the learned trial judge accepted the evidence of SP3 who according to the learned judge had stated in no uncertain terms that the appellant was wearing
G the jacket in which the drugs were found and the said jacket was produced as exhibit. The learned judge found that the fact that the Pierre Avva jacket was not produced at the trial did not affect or mar the prosecution case because the evidence of the
H prosecution was that it was the appellant who was wearing the Eisenegger jacket in which the drugs were found. The learned judge found that it was unlikely that the appellant was holding the Eisenegger jacket for Hossein because according to the learned judge:

I (a) why would the appellant hold the jacket for Hossein when Hossein was only an acquaintance whom the appellant had met on the flight;

(b) while walking at KLIA the appellant and Hossein did not interact;

(c) if the appellant was holding the jacket for Hossein why would the appellant walk ahead of Hossein with Hossein's jacket?

The learned judge also examined the other evidence of the defence and found that:

(a) it is strange for a person working in a restaurant earning a small income of USD350 per month could afford to purchase a business class return ticket to Malaysia to look for a job in a restaurant at Bukit Bintang owned by a long time friend called "Said";

(b) there is no work permit shown in the appellant's passport or any other document to show that he had come to Malaysia to work and the appellant had a return ticket;

(c) if it is true that "Said" exists, he could have been called to give evidence to "save' the appellant.

The learned judge found the defence to be full of inconsistencies which are not logical and not probable and that the defence has not cast a doubt in the prosecution's case. Consequently the learned judge found that the prosecution has proven its case beyond a reasonable doubt and Her Ladyship found the appellant guilty and convicted him.

The Appeal

[13] Before us learned counsel for the appellant Tuan Haji Hisyam Teh Poh Teik raised two grounds of appeal:

(i) that the learned judge had misdirected herself when Her Ladyship did not sufficiently consider the defence case, and

(ii) that the learned judge erred in law when she failed to rule whether the appellant had rebutted the presumption under s. 37(da) of the Act.

[14] In respect of the first ground learned counsel raised the following issues:

(i) that Hossein was a real and not a fictitious person and it was in the prosecution's evidence that Hossein had behaved suspiciously, and

A (ii) that the Pierre Avva jacket was not produced in court.

[15] Learned counsel submits that the learned trial judge had not sufficiently considered evidence in favour of the defence. Referring to the evidence of SP3 who denied any knowledge about Hossein
B (p. 29 of appeal record), his evidence regarding exh. D18 (at pp. 34 and 174 appeal record) and the discrepancies between exhs. P16 and P17, learned counsel submits that SP3 is not a credible witness. It is the defence case that the appellant was wearing the Pierre Avva jacket and he was asked by Hossein to
C hold the Eisenegger jacket. This jacket was not produced although there is evidence that it was seized. It is submitted that this evidence lends credibility to the appellant's version and makes the appellant's version probable and true.

D **[16]** With regard to Hossein, counsel submits that Hossein's arrest strongly corroborated the appellant's version that Hossein was with him and adds credibility to the appellant's narrative that the Eisenegger jacket belonged to Hossein. Hossein is not a fictitious person. It is submitted that the evidence of SP6 that he
E had arrested Hossein approximately five minutes after the appellant's arrest because Hossein was behaving suspiciously lends credence to the appellant's version and shows a nexus between Hossein and the drugs found in the Eisenegger jacket. Thus counsel submits that the appellant's evidence that he was holding
F the jacket for Hossein was not inherently incredible. Learned counsel submits that the case for the defence had been put to the prosecution and the prosecution would have known of the importance of Hossein as a material witness who could answer crucial questions as to whether he was the trafficker. Yet the
G prosecution had not called him or offered him to the defence at the close of the prosecution case. Thus it is submitted that s. 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution and in support counsel cited the case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705. Counsel
H submits that without the evidence from Hossein there is an obvious gap in the prosecution's case and the prosecution could not have been said to have proven its case beyond reasonable doubt (*Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433).

I **[17]** For the prosecution learned Deputy Public Prosecutor (DPP) submits that having evaluated the defence the learned trial judge has accepted the prosecution's version that the appellant had been wearing the Eisenegger jacket and has found that the non-

production of the said jacket did not mar or affect the prosecution case. On the discrepancies between exhs. P16 and P17 it is submitted that SP3 had acknowledged that he had made a mistake and he had made corrections as shown in exh. P17. On the issue of s. 114(g), it is submitted that there is sufficient evidence to support the conviction even without the evidence of Hossein. In support learned DPP relied on the case of *Jazuli Mohsin v. PP* [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165; [1990] 2 MLJ 190.

[18] The record of appeal shows that the testimony of SP3 is pivotal to the prosecution's case and the learned trial judge has accepted his testimony without any apparent reservation. The credibility and reliability of SP3 does not appear to be an issue for Her Ladyship. However we find that apart from the discrepancies between the search list exh. P16 and exh. P17, the testimony of SP3 had been contradicted by SP6. In his cross-examination SP3 agreed with defence counsel that he had no knowledge whatsoever about Hossein. SP3 testified as follows (p. 29 appeal record):

S : Kamu tidak ada pengetahuan tentang Hossein Moshk Pour ini langsung?

J : Ya.

S : Tidak tahu Hosein merupakan salah seorang penumpang yang tiba dari Bahrain bersama dengan OKT?

J : Tidak tahu.

However SP6 in his testimony said that he had informed SP3 about Hossein after SP6 had lodged his report exh. P22. SP6 testified as follows (p. 58 appeal record):

S : Ada serahkan laporan ini kepada Hassan atau IO kes?

J : Tidak memandangkan repot ini tidak ada untuk tindakan selanjutnya.

S : Ada maklum berkenaan tahan lelaki ini dan buat pemeriksaan kepada Sarjan Hassan atau IO kes?

J : Saya cuma maklum repot saya kepada Sarjan Hassan sahaja selepas selesai repot.

S : Ada maklum berkenaan tangkapan kepada Sarjan Hassan secara detail atau bagaimana?

A J : Tidak secara detail memandangkan repot yang dibuat hanyalah untuk cover repot sahaja supaya pemeriksaan yang saya buat ke atas lelaki tersebut atas dasar tugas.

In the learned judge's grounds of judgment Her Ladyship made no reference at all to the testimony of SP6 and the obvious contradiction between his testimony and the testimony of SP3. Her Ladyship has also not given any consideration to the discrepancies between exhs. P16 and P17 and the explanation given by SP3. We are of the considered view that based on the clear contradictions between the testimonies of SP3 and SP6, it is incumbent upon the learned trial judge to properly evaluate the testimony of SP3 as the contradictions between his testimony and that of SP6 renders the evidence of SP3 suspect. The evaluation of the testimony of SP3 is crucial because it is the appellant's case that he was not wearing the Eisenegger jacket but was wearing the Pierre Avva jacket, that he did not understand SP3 and that when the drugs were discovered he had pointed to Hossein twice. In our considered view had the learned judge considered the inconsistencies between the testimony of SP3 and SP6 and the inconsistencies between exhs. P16 and P17, Her Ladyship would have reminded herself to treat the testimony of SP3 with caution. We are of the view that the failure of the learned judge to direct her mind to the evidence of SP3 and evaluate the reliability of his evidence before Her Ladyship made her decision to accept his testimony without reservation amounts to a misdirection by way of non-direction.

[19] On the issue of s. 114(g) which learned counsel submits ought to be invoked against the prosecution for failing to make Hossein available to the defence to answer the crucial question whether he is the real trafficker, we are of the view that this has not prejudiced the defence. Even if Hossein was made available and called as defence witness, in all probability he would not admit that he is the real trafficker. It would be foolhardy of him to do so. Hence we are unable to agree with learned counsel that s. 114(g) ought to be invoked against the prosecution. On the failure to produce the Pierre Avva jacket which the appellant said he wore at the time he was stopped by SP3, counsel submits that the learned judge has failed to consider that the existence of the jacket makes the appellant's version probable and true and lends credibility to the appellant's version. We find from the learned judge's grounds of judgment that Her Ladyship did accept the existence of the Pierre Avva jacket. However Her Ladyship

accepted the evidence of SP3 that the appellant was wearing the Eisenegger jacket and not the Pierre Avva jacket. We agree with the learned judge that even if the appellant was wearing the Pierre Avva jacket and was holding the Eisenegger jacket, both jackets were with him at the time he was stopped by SP3. In our considered view the failure to produce the Pierre Avva jacket has not prejudiced the defence since its existence is never disputed.

[20] Learned counsel submits that the learned judge has not sufficiently considered the defence case. The appellant's defence is that Hossein is the real trafficker and the appellant is an innocent carrier. The appellant had said that he was wearing the Pierre Avva jacket and was holding the Eisenegger jacket. He said he had pointed to Hossein. SP3 had disagreed. The question whether the appellant was wearing the Eisenegger jacket as claimed by SP3 or whether the appellant was wearing the Pierre Avva jacket and holding the Eisenegger jacket as the appellant claims, and whether the appellant had indicated to SP3 that the Eisenegger jacket did not belong to him and that he had pointed to Hossein are crucial facts having regard to his defence that he was an innocent carrier. The onus is upon the prosecution to disprove these important parts of the appellant's version of facts. In *Aedy Osman v. PP* [2011] 1 CLJ 273 James Foong FCJ said *inter alia*:

> ... it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof.

It is in evidence that there were nine members in the team on duty together with SP3 at the time the appellant was arrested. Except for the testimonies of SP3 and SP6 (who was 30 feet away at the material time) no other member of the team was called. We are of the view that the prosecution ought to have called other relevant officers present together with the appellant and SP3 to testify to rebut the appellant's claim particularly when it was not denied that Hossein was also arrested by SP6 soon after the appellant's arrest. The lack of rebuttal evidence on these relevant and material facts was detrimental to the prosecution.

[21] The defence of innocent carrier was raised in the case of *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311. In his judgment Mohd Azmi SCJ said *inter alia* as follows:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963]1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. To satisfy this test it is not so much the words used by the Judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found the learned trial Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

Gopal Sri Ram JCA (as he then was) referred to the abovementioned case in *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773) wherein His Lordship said as follows:

> That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken.

In *Aedy Osman v. PP (supra)* James Foong FCJ said *inter alia*:

> In *PP v. Iskandar Mohamad Yusof* [2006] 6 CLJ 379, *Chow Kok Keong v. PP* [1998] 2 CLJ 469, *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773, it was held that if there is evidence adduced to demonstrate that someone else rather than the accused was the real trafficker, then the trial judge should give due consideration to this before arriving at a decision to convict the

accused. But the common thread among these authorities is that the accused had relied on some creditable evidence that another person was the real culprit.

[22] In the present case there is ample evidence that Hossein was also stopped by SP6 approximately five minutes after the appellant was stopped by SP3. SP6 explained that he stopped Hossein because Hossein was behaving suspiciously, the same reason that SP3 gave for stopping the appellant. But upon inspection nothing incriminating was found on Hossein. Despite this there is evidence in the form of exh. D18 which shows that Hossein's handphones were seized and according to SP6 the police from Bukit Aman took over the investigations of Hossein. The learned judge disbelieved the appellant and rejected his defence as being full of inconsistencies which are not logical and not probable. Having considered the evidence we agree with learned counsel that the learned judge has not considered credible evidence and give proper consideration to the facts which show a nexus between the appellant and Hossein and that Hossein could have been the real trafficker. In our considered view the learned judge has not exercised the mandated maximum evaluation of the whole evidence to the effect that it is probable that Hossein was the real culprit as contended by the appellant.

[23] The prosecution is not relying on the presumption of possession under s. 37(d) of the Act. In the absence of the statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. In the absence of direct evidence of trafficking, the prosecution must prove the ingredient of "possession". The law is well settled that having only custody or control over the said drugs is insufficient to establish "possession" which is an important ingredient in the charge of trafficking. The mere act of carrying is not sufficient to constitute the offence of trafficking (*PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129). The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. Knowledge is the key ingredient of possession. Proof of possession in criminal law requires the prosecution to prove that the possessor knew the nature of the thing possessed ie, knowledge of what the thing essentially or basically is. In *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237 Thomson J (as he then was) said:

Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. And for this purpose as was pointed out by Gordon-Smith Ag. C.J. in the

A case of *Toh Ah Lam and Mak Thim v. Rex* (1949) MLJ 54, *supra*, it is necessary to prove that the person in possession knows the nature of the thing possessed.

To prove the element of guilty knowledge or *mens rea* it is necessary for the prosecution to prove that the accused knew the nature of the particular drug that he was in possession of as a dangerous or prohibited drug but the prosecution need not also prove knowledge as to the name, type or exact qualities of the dangerous drug. The accused is entitled to prove, if he can, that he did not know that the contents of the thing he was in custody or control of were a dangerous drug. (*PP v. Reza Mohd Shah Ahmad Shah* [2010] 1 CLJ 541; [2009] 1 LNS 1194). Further there is a physical element and mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. (see *Teng Howe Sing v. PP* [2009] 3 CLJ 733; [2009] 1 LNS 36, FC).

[24] The appellant herein denies knowledge of the drugs. The question is whether on the evidence adduced by the prosecution it can safely be concluded that the appellant had *mens rea* possession of the drugs independent of the statutory presumption under s. 37(d) of the Act. The learned judge inferred that the appellant must have had knowledge that in the Eisenegger jacket were the eight packets based on the evidence of SP3 that the appellant was seen to be restless when being stopped for examination, that the weight of the jacket would be heavy or heavier than an ordinary jacket and that the jacket had bulges. The learned judge made a finding that there is a strong inference that the appellant would have known the existence of the eight packets. We have carefully scrutinised the grounds of judgment and we note that nowhere in the grounds of judgment has Her Ladyship made an inference that the appellant knew that in the eight packets were dangerous drugs. In our view knowledge of the eight packets is not synonymous with knowledge that the eight packets contained dangerous drugs. Even if an inference can be made that the appellant has knowledge of the eight packets, it is incumbent on the trial judge to go a step further to consider whether the appellant knew that in the eight packets were

dangerous or prohibited drug. We find that the learned judge has overlooked or failed to direct her mind to the issue whether it can be inferred that the appellant knew not only of the existence of the eight packets but also that the eight packets contained dangerous drug. The prosecution must prove the ingredient of "possession" and the trial judge must make an affirmative finding of "possession" before the presumption of trafficking under s. 37(da) of the Act can be invoked. (*Muhammed Hassan v. PP* [1998] 2 CLJ 170; *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113).

[25] We are of the view that the failure by the learned judge to make an affirmative finding that the appellant has *mens rea* possession of the drugs as understood in criminal law is a serious misdirection. Notwithstanding the evidence of SP3 that the appellant was acting in a suspicious manner, there is no evidence that the appellant had attempted to resist or refused inspection of the jacket and bag. He made no attempt to flee. The appellant admitted that the jacket was heavy but said that he was not concerned because the jacket belonged to Hossein and he was only holding it for Hossein. In our considered view there is no factual matrix upon which an inference could be made that the appellant has knowledge that the plastic packets which were hidden inside the lining of the Eisenegger jacket contained dangerous drug. (see *PP v. Tan Tatt Eek* [2005] 4 CLJ 460).

[26] We now turn to the second ground raised by learned counsel that the learned judge has erred in law when she failed to rule whether the appellant had succeeded in rebutting the presumption under s. 37(da) of the Act. The learned judge has found the defence to be full of inconsistencies and claims which are not logical and not probable. Her Ladyship found the defence is not at all probable and had not cast a doubt in the prosecution's case. Learned defence counsel submits that the learned judge has failed to make a finding whether on a balance of probabilities the appellant has failed to cast a reasonable doubt in the prosecution case and submits that such failure or omission is a serious misdirection. In support counsel cites the case of *PP v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113 where the misdirection as to the burden of proof had occurred at the end of the defence case. The Court of Appeal affirmed the decision of the High Court which quashed the convictions and sentences and ordered a retrial. The learned DPP in his reply conceded that the learned judge has not stated in her grounds of judgment whether the defence has rebutted the presumption of trafficking on a

balance of probabilities but submits that the trial judge has applied the lesser standard of reasonable doubt and yet the defence has failed to meet the standard. With respect we are unable to agree with learned DPP. Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the learned judge to consider, as a separate exercise, whether on a balance of probabilities the evidence of the defence has rebutted the statutory presumption of trafficking (see *Subramaniam Arumugam v. PP* [2000] 2 CLJ 1 FC). In *Mohamad Radhi Yaakob v. PP (supra)* the court said:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the Court to be convinced that the defence version is true, in which case the Court must order an acquittal. In appropriate cases it is also not wrong for the Court to conclude that the defence story is false or not convincing, but in that instance, the Court must not convict until it asks a further question that even if the Court does not accept or believe the defence explanation, does it nevertheless, raise a reasonable doubt as to his guilt?

In that case it was held that the failure to consider whether the defence has raised a reasonable doubt is a material misdirection and is fatal to the conviction.

[27] The appellant is not required to prove his innocence beyond reasonable doubt. All that is required of him is to raise a reasonable doubt. It is incumbent on the learned judge to consider whether on the balance of probabilities the evidence of the defence had rebutted the statutory presumption under s. 37(da) of the Act. We have perused the grounds of judgment and it is apparent that the trial judge has failed to carry out a separate exercise to consider whether the appellant had succeeded on the balance of probabilities to rebut the statutory presumption. We agree with learned counsel that the learned judge has failed to consider evidence from which inferences favourable to the appellant could have been made which, on a balance of probabilities, would have succeeded in rebutting the said presumption. In our view such omission has occasioned a miscarriage of justice. We find that it was not safe to sustain the conviction. For the reasons stated above we allowed the appeal and set aside the conviction and sentence.